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No. 08-65

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEVIN NEILSON, *et al.*,

Petitioners,

v.

SEABOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Supreme Court grant Petitioners' *writ* to reconsider the Missouri Court of Appeals' determination that Petitioner Neilson's undisputed failure to ever sign an employment agreement for a prior overseas position with a previous employer, as explicitly required by the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is fatal to any attempt to compel arbitration for conduct arising four years after leaving his prior employer?

2. Does a fourteen-year-old opinion by a single circuit court, an opinion which has been soundly rejected by the only two other circuit courts that have considered the same issue, provide compelling reasons for this Court to reconsider the decision by the Missouri Court of Appeals when Petitioners failed to raise or cite to the purported split in any briefing before the Missouri Court of Appeals?

3. Have Petitioners presented any compelling reasons for this Court to reconsider a mixed factual and legal decision by the Missouri Court of Appeals decided pursuant to Missouri law holding that Petitioners have failed to properly allege the existence of any arbitration agreement relevant to any of Respondents' claims?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following were parties to the proceedings before the Missouri Court of Appeals for the Western District:

Seaboard Corporation
Seaboard Overseas Limited
Seaboard Overseas Trading and Shipping (Proprietary) Limited

Seaboard Corporation's shares are publicly traded on the American Stock Exchange. It has no parent and no publicly held company owns 10% or more of Seaboard Corporation's stock. Seaboard Overseas Limited and Seaboard Overseas Trading and Shipping (Proprietary) Limited are directly or indirectly wholly owned subsidiaries of Seaboard Corporation. Other than Seaboard Corporation, no publicly held company owns 10% or more of Seaboard Overseas Limited's or Seaboard Overseas Trading and Shipping (Proprietary) Limited's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
APPLICABLE TREATIES AND STATUTES	1
STATEMENT OF THE CASE	3
I. OVERVIEW OF RESPONDENTS' UNDERLYING CLAIMS	3
II. FACTUAL HISTORY	5
A. Neilson's Employment with Respondents	5
B. Asset Purchase Agreement Between SOL, GIL and Atlas	8
III. PROCEDURAL HISTORY	9
A. Remand Proceedings in the United States District Court	9
B. The New York Litigation	11

Contents

Page

C. Petitioners' Motion in the Circuit Court of Jackson County 12

D. The Missouri Court of Appeals' Decision 13

E. The Missouri Supreme Court Declines Transfer 15

REASONS FOR DENYING THE PETITION 15

I. PETITIONERS FAIL TO ARTICULATE ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' DETERMINATION THAT PETITIONER NEILSON HAD NO VALID ARBITRATION CLAUSE WITH RESPONDENTS. 16

A. THE MISSOURI COURT OF APPEALS CORRECTLY DETERMINED THAT NEILSON HAS NO WRITTEN ARBITRATION AGREEMENT RECOGNIZED BY THE CONVENTION OR THE FAA. 17

1. Petitioners Do Not Challenge the Missouri Court of Appeals' Determination that the Convention Does Not Apply to Neilson's Unsigned Employment Letter. .. 17

Contents

Page

2. The FAA Does Not Trump the Convention's Writing Requirement. 18

B. THERE IS NO RELEVANT SPLIT OF AUTHORITIES AMONG THE CIRCUIT COURTS. 21

II. THE MISSOURI COURT OF APPEALS' APPLICATION OF THE CONVENTION'S EXPLICIT WRITING REQUIREMENT DOES NOT VIOLATE THE INTENT OF THE CONVENTION OR ANY FEDERAL PUBLIC POLICY. 26

III. PETITIONERS FAIL TO PRESENT ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' FACTUAL DETERMINATION THAT RESPONDENTS' CLAIMS DO NOT ARISE OUT OF, RELATE TO OR ARE CONNECTED TO ANY ARBITRATION AGREEMENT IN THE ASSET PURCHASE AGREEMENT. .. 27

CONCLUSION 33

TABLE OF CITED AUTHORITIES

Page

Cases

Adams v. Robertson,
520 U.S. 83, 117 S. Ct. 1028 (1997) 24

AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh,
242 F.3d 777 (8th Cir. 2001) 28

Banc One Acceptance Corp. v. Hill,
367 F.3d 426 (5th Cir. 2004) 29

Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.,
334 F.3d 721 (8th Cir. 2003) 28

Bothell v. Hitachi Zosen Corp.,
97 F. Supp. 2d 1048 (W.D. Wash. 2000) 17

Contec Corp. v. Remote Solution Co., Ltd.,
398 F.3d 205 (2d Cir. 2005) 31, 32

Czarina, LLC v. W.F. Poe Syndicate,
254 F. Supp. 2d 1229 (M.D. Fla. 2002),
aff'd 358 F.3d 1286 (11th Cir. 2004) 17

Diesselhorst v. Munsey Bldg., L.L.L.P.,
No. Civ. AMD 04-3302, 2005 WL 327532
(D. Md. Feb. 9, 2005) 32

Cited Authorities

Page

Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85 (2d Cir. 2005) 18

Finney v. Nat'l Healthcare Corp., 193 S.W.3d 393 (Mo. Ct. App. 2006) 28

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920 (1995) 31

Hibbs v. Winn, 542 U.S. 88, 124 S. Ct. 2276 (2004) 20

Houlihan v. Offerman & Co., 31 F.3d 692 (8th Cir. 1994) 29

Howell v. Mississippi, 543 U.S. 440, 125 S. Ct. 856 (2005) 24

In re Tyco Int'l, Ltd., No. 02-1335-B, 2004 WL 524429 (D.N.H. March 16, 2004) 32

Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd., 186 F.3d 210 (2d Cir. 1999) 17, 22, 25

Korte Const. Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395 (Mo. Ct. App. 1996) 28

Liberty Mut. Ins. Co. v. Mandaree Public Sch. Dist. # 36, 503 F.3d 709 (8th Cir. 2007) 28

Cited Authorities

Page

M&C Corp. v. Erwin Behr GmbH & Co., KG,
87 F.3d 844 (6th Cir. 1996) 19

Martek Biosciences Corp. Zuccaro,
No. Civ. AMD 04-3349, 2004 WL 2980741
(D. Md. Dec. 23, 2004) 32

McDermott Int'l, Inc.
v. Lloyd's Underwriters of London,
120 F.3d 583 (5th Cir. 1997) 18-19

Medcam, Inc. v. MCNC,
414 F.3d 972 (8th Cir. 2005) 28

Oil Chem. & Atomic Workers Int'l Union
(AFL-CIO) v. Conoco, Inc.,
241 F.3d 1299 (10th Cir. 2001) 29

Sarhank Group v. Oracle Corp.,
404 F.3d 657 (2d Cir. 2005) 17

Scherk v. Alberto-Culver Co.,
417 U.S. 506, 94 S. Ct. 2449 (1974) 20

Sen Mar, Inc. v. Tiger Petroleum Corp.,
774 F. Supp. 879 (S.D.N.Y. 1991) 17

Sphere Drake, Inc. PLC v. Marine Towing, Inc.,
16 F.3d 666 (5th Cir. 1994) ..... *passim*

Cited Authorities

Page

Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440 (3d Cir. 2003) 17, 22, 25

Terminix Int'l Co. LP v. Palmer Ranch LP, 432 F.3d 1327 (11th Cir. 2005) 31, 32

Federal Statutes and Treaties

9 U.S.C. § 2 ..... 1, 18

9 U.S.C. § 16 13

9 U.S.C. § 201 1

9 U.S.C. § 208 ..... 2, 18

28 U.S.C. § 1257 23

Convention on the Recognition and Enforcement of Foreign Arbitral Awards ..... *passim*

Rules

Supreme Court Rule 10 ..... 15, 27, 32

Supreme Court Rule 14 21

Page

Other Authority

Kenneth S. Geller & David M. Gossett, *Appeals to the Supreme Court, in* BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 179, 201 § 52:14 (2d ed., Robert L. Haig ed., 2005) 25

APPLICABLE TREATIES AND STATUTES

The Petition invokes two applicable sources of law: the Federal Arbitration Act ("FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). The relevant provision of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Convention is a United Nations' agreement that is incorporated and adopted by the FAA. *See* 9 U.S.C. § 201 (stating that the Convention "shall be enforced in United States courts in accordance with this chapter."). There are two sections of the Convention relevant to this Petition. Article II(2) of the Convention states:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Article VII(1) of the Convention further states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

The FAA is applicable to arbitration agreements governed by the Convention, but only to the extent that the FAA and the Convention do not conflict. The FAA provides:

> Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter [the Convention] to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 208.

STATEMENT OF THE CASE

I. OVERVIEW OF RESPONDENTS' UNDERLYING CLAIMS

Respondents consist of three entities: Seaboard Corporation ("Seaboard"), Seaboard Overseas Limited ("SOL"), and Seaboard Overseas Trading and Shipping (Proprietary) Limited ("SOTS"). Seaboard is a Delaware corporation with its principal place of business in Merriam, Kansas (a suburb of Kansas City). SOL is a subsidiary of Seaboard with its principal place of business in Bermuda. Although not a named party, Seaboard Overseas & Trading Group ("SOTG"), a division of Seaboard, is also referenced throughout these proceedings.

In the underlying litigation, Respondents allege that in early 2005, Seaboard entrusted Petitioner Kevin Neilson ("Neilson") with negotiating a potential business transaction with Grindrod Limited ("Grindrod") on Seaboard's behalf. During the course of those negotiations and unbeknownst to Respondents, however, Neilson, Grindrod, and other members of Grindrod's corporate family conspired to lure away Seaboard's key employees and most of Seaboard's customers. On May 8, 2005, most of Seaboard's key employees resigned en masse, pursuant to Petitioners' secret plan, and immediately joined a subsidiary of Grindrod. In furtherance of this conspiracy, Neilson, while still employed by Seaboard, disclosed confidential information, including crucial financial, employee and customer information, to the other Petitioners that allowed Petitioners to implement their secret plan. Only

after the occurrence of this wrongful conduct and the resulting injury, SOL entered into an Asset Purchase Agreement selling certain assets to Petitioners Grindrod International Limited ("GIL") and Atlas Trading & Shipping Limited ("Atlas").

In August 2005, Respondents filed suit against Neilson, Grindrod, GIL, Atlas and Unicorn Shipping (Proprietary) Limited ("Unicorn"). Respondents filed their Petition in the Circuit Court for Jackson County, Missouri ("Circuit Court") and alleged the following nine causes of action: fraud, negligent misrepresentation, breach of fiduciary duty, misappropriation of corporate opportunities and breach of confidentiality agreements against Neilson; civil conspiracy against Neilson and all Grindrod-related companies; tortious interference with contract and aiding and abetting a breach of fiduciary duties against Grindrod and Atlas; and tortious interference with prospective business expectancies against Neilson, Grindrod and Atlas. All of Respondents' causes of action are based upon conduct and the resulting injury that occurred prior to the execution of the Asset Purchase Agreement. None of Respondents' claims seek to enforce, construe, or rescind the Asset Purchase Agreement in any manner.[1]

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1. Of the eight named parties involved in this lawsuit, Petitioners allege that only four parties, SOL, Neilson, GIL and Atlas, are even potentially subject to arbitration agreements. Petitioners do not allege the existence of any arbitration agreements relevant to Seaboard, SOTS, Grindrod or Unicorn.

II. FACTUAL HISTORY

A. Neilson's Employment with Respondents

In April 1995, Neilson began working in Kansas City as Vice President for Seaboard Commodity Trading, Ltd. In March 1999, Neilson accepted a position with SOL to become its Executive Vice President and General Manager. In his new role with SOL, Neilson was transferred to Bermuda. During his employment with SOL in Bermuda, SOL classified Neilson as a foreign service employee because Neilson was required to perform his job duties outside of the United States. It is SOL's practice to issue employment letters to all foreign service employees. SOL does not have employees based in the United States.

In December 2000, Neilson moved from Bermuda to North Carolina. As a result of his relocation and to reflect his new domicile, SOL sent Neilson a foreign service employee offer letter on or about January 1, 2001. The employment letter was issued on SOL letterhead with SOL's Bermuda address. The letter identified SOL as "the Company" and identified Neilson as an expatriate whose work with SOL was contingent on his ability to maintain a work permit in Bermuda. Paragraph three of the letter required Neilson to perform *all* of his duties "outside the United States and in *no* circumstance can you perform *Duties* while *physically in the United States*." (emphasis added).

SOL's employment letter also contained the arbitration provision at issue in this Petition. The arbitration provision states in part:

> Any dispute between any of the parties hereto or claim by a party against another party arising out of or in relation to this agreement or in relation to any alleged breach thereof shall be finally determined by arbitration in accordance with the rules then in force of the American Arbitration Association by a panel of three arbitrators. The arbitration proceedings shall take place in New York, New York or such other location as the parties in dispute hereafter may agree upon; and such proceedings will be conducted in the English language and shall be governed by the laws of Bermuda.

In January 2001, SOL signed the employment letter and sent it to Neilson for his approval because it was then Neilson's intent to work exclusively overseas. It is undisputed by the parties that Neilson moved to Seaboard's Kansas City offices in 2002 and never signed or returned the SOL employment letter to Seaboard.

In July 2002, when Neilson moved to Kansas City, Neilson became the Vice President of Grains and Trading for SOTG, a division of Seaboard. Thus, as of July 2002, Neilson lived in the Kansas City metropolitan area and worked out of Seaboard's corporate headquarters in Kansas for SOTG. Because he was now performing his duties *in* the United States for SOTG, Neilson was classified as a domestic employee of Seaboard's SOTG division. Neilson did not and could

not perform "all duties" outside the United States as his January 2001 employment letter, if executed, would have required.

Neilson's new role with SOTG was documented in a SOTG interoffice memorandum in July 2002 that stated, "Effective July 1, 2002, Kevin Neilson has transferred to Kansas City as Seaboard Overseas and Trading Group Vice President Grains and Trading." The memorandum was issued on SOTG letterhead and the subject was "Seaboard Overseas and Trading Group Personnel Changes." Additionally, Neilson helped draft a description of his new job duties with SOTG and at Neilson's request, SOTG issued to Neilson new business cards reflecting that he was a SOTG employee.

SOTG does not issue employment letters, employment agreements or arbitration agreements to domestic employees whose job duties are based within the United States. Consequently, there is neither an offer letter nor an employment contract with Neilson for his position with the SOTG division of Seaboard. Neilson continued to serve as the Vice President of Grains and Trading for SOTG until he resigned on April 26, 2005. All of Respondents' causes of action are based upon conduct occurring in 2004 and 2005, more than two years after Neilson left his employment with SOL and began his employment in Kansas City with Seaboard's SOTG division.

B. Asset Purchase Agreement Between SOL, GIL and Atlas

After Petitioners' tortious conduct occurred and in May 2005, SOL sold certain assets to GIL and Atlas. GIL, Atlas and SOL thereby executed an Asset Purchase Agreement ("the Agreement"). The Agreement contained an arbitration provision that stated in part:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.

In another section, the Agreement defines "Dispute" as:

> [A]ny dispute, controversy, or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

III. PROCEDURAL HISTORY

A. Remand Proceedings in the United States District Court

After Respondents filed their Petition in the Circuit Court of Jackson County, Missouri in August 2005, Petitioners removed the lawsuit to the United States District Court for the Western District of Missouri. Petitioners predicated their Notice of Removal on the Convention, claiming that Respondents' claims were subject to arbitration agreements that were governed by the Convention. Disputing the existence of any valid and relevant arbitration agreement, Respondents moved the District Court to remand their Petition to the Circuit Court.

On August 1, 2006, the Honorable Fernando J. Gaitan, Jr., District Court Judge for the United States District Court for the Western District of Missouri, entered an Order granting Respondents' Motions to Remand. Judge Gaitan stated that in order to determine whether federal subject matter jurisdiction existed, "the Court must determine first whether a valid agreement to arbitrate existed between the parties." If a valid agreement existed, then the court had to determine whether a "specific dispute is within the scope of [an] agreement."

Judge Gaitan held that Neilson failed to prove the existence of any valid arbitration agreement. The court found that although SOL signed the employment agreement containing the arbitration clause, Neilson never signed it and the agreement failed to satisfy the

writing requirement under the Convention. Judge Gaitan further found that the employment agreement

> related to Neilson' position as Executive Vice President/General Manager of Seaboard Overseas Limited. . . . [E]ven if plaintiff had signed the letter, the letter no longer applied, because the conduct of which [Respondents] complain occurred long after [Neilson] had left his position as Executive Vice President of SOL in 2002. It is also undisputed that after [Neilson] left his position with SOL and transferred to SOTG, he became a domestic employee and Seaboard does not give offers of employment letters to its domestic employees.

The Court therefore concluded that "[b]ased on an examination of the undisputed facts, the Court finds that there was no agreement [to arbitrate] . . ."

In analyzing the arbitration clause in the Asset Purchase Agreement, the court initially noted that it should compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Mindful of this high standard, the court examined the arguments made by Atlas and GIL, ultimately finding that Petitioners failed to prove the existence of any arbitration agreement relevant to any allegations in Respondents' Petition:

> [Respondents]' claims do not arise out of the Asset Purchase Agreement. The Asset

> Purchase Agreement defines a dispute as all claims 'arising out of, relating to, or connected with' the Agreement. [Respondents'] claims do not relate to the Agreement. [Respondents] have asserted claims against Atlas and Grindrod involving civil conspiracy, tortious interference with contract, aiding and abetting a breach of fiduciary duty and tortious interference with prospective business expectancy or prospective business relationship. They are not seeking in their petition to enforce or rescind the Agreement, nor are they seeking damages for a breach of the Agreement. Therefore, the Court finds that the [Respondents]' petition does not fall within the scope of the Arbitration clause contained in the Asset Purchase Agreement.

Based on this reasoning, Judge Gaitan remanded the lawsuit back to the Circuit Court.

B. The New York Litigation

After Judge Gaitan remanded the lawsuit, on August 17, 2006, Petitioners filed a separate Petition to Compel Arbitration in the Supreme Court of New York for the County of New York. In their New York Petition, Petitioners raised the same issues that had previously been resolved by Judge Gaitan in his Order remanding the case to the Circuit Court.

C. Petitioners' Motion in the Circuit Court of Jackson County

On August 18, 2006—one day after they filed their New York Petition—Petitioners filed in the Circuit Court of Jackson County their Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York. In their Motion, Petitioners requested that the Circuit Court stay the underlying proceedings pending the outcome of the New York litigation.

Just as Judge Gaitan had, the Circuit Court rejected Petitioners' arguments. In an Order dated October 23, 2006, the Honorable Sandra C. Midkiff determined that the arbitration clauses cited by Petitioners were not applicable to the litigation. Regarding Neilson's attempt to compel arbitration, Judge Midkiff found "there was no written agreement in place that would subject [Respondents] to the arbitration clause in this case" because Neilson never signed it. Judge Midkiff also noted that the "letter no longer applied when Neilson left his job at SOL" in 2002. Thus, Judge Midkiff determined that the arbitration provision contained in Neilson's employment letter was wholly inapplicable to this litigation.

Regarding the Asset Purchase Agreement, Judge Midkiff concluded "[Respondents]' claims in this case do not relate to the Asset Purchase Agreement, but rather to the conduct that preceded the signing of the document." Moreover, Judge Midkiff noted that "the Asset Purchase Agreement does not apply to all parties in this action. Only SOL, Atlas and GIL are parties to the Asset Purchase Agreement. There is no contractual

obligation compelling Seaboard Corp. and SOTS to arbitrate."[2]

In a subsequent Judgment and Order dated December 21, 2006, Judge Midkiff held that her previous Order "is immediately appealable pursuant to the Federal Arbitration Act, 9 U.S.C. § 16 and Rule 74.01(b) of the Missouri Rules of Civil Procedure and that there is no just reason for delay of an appeal of this Judgment and Order . . ." Petitioners subsequently filed their Notice of Appeal with the Missouri Court of Appeals for the Western District.

D. The Missouri Court of Appeals' Decision

On appeal, Petitioners argued that the arbitration clause in Neilson's employment letter satisfied the writing requirement of the Convention and that the letter constituted an "exchange of letters or telegrams" that brought it within the Convention's definition of an "agreement in writing." The Missouri Court of Appeals unanimously rejected these arguments and held that Neilson's employment letter did not satisfy the Convention's requirements because Neilson never signed it. Moreover, the Missouri Court of Appeals rejected Petitioners' argument that the employment letter was an "exchange of letters or telegrams."

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2. Petitioners' *writ* was filed on behalf of only three of the five Defendants in the underlying litigation, Neilson, GIL and Atlas. Petitioners do not allege that Grindrod and Unicorn have any applicable arbitration agreements with any Respondents. Therefore, as Judge Midkiff correctly determined, regardless of any final orders regarding arbitration, certain parties and certain claims in this lawsuit will proceed in Missouri state court.

Because the Court found that the employment letter did not satisfy the Convention's writing requirement, it never addressed whether the SOL employment letter, even if executed, remained effective against Neilson, as a domestic employee, in his new position with SOTG in Kansas City. *See* Pet. at 5a n.4.[3]

Regarding the Asset Purchase Agreement, the Court of Appeals unanimously agreed with the findings of Judge Gaitan and Judge Midkiff and held:

> None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims in the Petition, the arbitration clause in the Agreement is not applicable.

Pet. at 11a.

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3. Respondents note that this separate and independent ground for denying Petitioners' attempts to compel arbitration means that any decision by this Court will not fully resolve whether Respondent SOL's (Seaboard and SOTS never had an employment agreement with Neilson) claims against Neilson must be arbitrated. The Missouri Court of Appeals specifically declined to even reach this additional, independent basis to find that the arbitration clause, which is from Neilson's prior position with a previous employer, has any application to this lawsuit. *See* Pet. at 5a n.4. These remaining, outstanding grounds to deny arbitration further weigh in favor of denying this Petition.

E. The Missouri Supreme Court Declines Transfer

After the three-judge panel of the Missouri Court of Appeals issued its unanimous opinion, Petitioners moved for rehearing and transfer to the Missouri Supreme Court. The Missouri Court of Appeals *en banc* denied Petitioners' request for rehearing and the Missouri Supreme Court ultimately denied Petitioners' motion for transfer. *See* Pet. at 29a.

REASONS FOR DENYING THE PETITION

Three separate courts, the Federal District Court for the Western District of Missouri, the Circuit Court of Jackson County, Missouri and the Missouri Court of Appeals, have considered the merits of Petitioners' arguments and unanimously rejected them. The Missouri Court of Appeals for the Western District sitting *en banc* and the Missouri Supreme Court declined even to review these substantive rulings. Unable to obtain relief in any of these courts, Petitioners now seek relief from this Court.

Petitioners' *writ* should be denied because Petitioners fail to present any "compelling reasons" for review from this Court. S. Ct. R. 10(a). The Missouri Court of Appeals did not "decide[] an important federal question" that warrants the review of this Court, it did not rule on the validity of a federal or state statute, and it did not issue any novel rule of law that has any import beyond the facts of this particular dispute. Instead, the decision of the Missouri Court of Appeals is confined to the unique facts of this case alone, and the decision fails to raise any basis for issuing a *writ of certiorari* under Supreme Court Rule 10. For the reasons set forth herein, the Petition should be denied.

I. PETITIONERS FAIL TO ARTICULATE ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' DETERMINATION THAT PETITIONER NEILSON HAD NO VALID ARBITRATION CLAUSE WITH RESPONDENTS.

In reviewing the undisputed facts that Petitioner Neilson never signed any employment agreement and never exchanged any letters or telegrams regarding his employment agreement, the Missouri Court of Appeals correctly determined that "there was no applicable arbitration clause between Neilson and the Plaintiffs." *See* Pet. at 6a, 8a. Despite this correct holding, Petitioners ask this Court to instead apply certain terms from the FAA in clear contradiction of the Convention. Petitioners also attempt to manufacture a circuit split, based on a single circuit court opinion from fourteen years ago that has been rejected by the only two other circuit courts that have considered similar issues. Petitioners' arguments provide no compelling basis for this Court to grant their *writ.*

A. The Missouri Court of Appeals correctly determined that Neilson has no written arbitration agreement recognized by the Convention or the FAA.

1. Petitioners Do Not Challenge the Missouri Court of Appeals' Determination that the Convention Does Not Apply to Neilson's Unsigned Employment Letter.

The Convention defines an "agreement in writing" as an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *See* Convention at Article II(2). Applying the express language of the Convention, the Missouri Court of Appeals correctly determined that to be enforceable under the Convention, any arbitration agreement must be signed by the parties or be contained in an exchange of letters or telegrams. *See* Pet. at 6a; *see also Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999), *abrogated on other grounds Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005); *Czarina, LLC v. W.F. Poe Syndicate*, 254 F. Supp. 2d 1229, 1236 (M.D. Fla. 2002), *aff'd* 358 F.3d 1286 (11th Cir. 2004); *Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1052 (W.D. Wash. 2000); *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882-83 (S.D.N.Y. 1991).

The Missouri Court of Appeals' opinion correctly concluded that Neilson's employment letter does not satisfy the Convention's writing requirement because

it is undisputed that Neilson "never signed or returned the letter." Pet. at 6a. The Missouri Court of Appeals further correctly determined that Petitioners have wholly failed to provide any authority or factual basis supporting their naked claim that there was any "exchange of letters or telegrams" sufficient to satisfy the requirements of the Convention. *See* Pet. at 6a-8a.

2. The FAA Does Not Trump the Convention's Writing Requirement.

Rather than challenge these rulings, Petitioners now argue that the Missouri Court of Appeals "failed to address their alternative argument that the arbitration provision was nevertheless enforceable under Chapter 1 of the FAA, 9 U.S.C. § 2" because the FAA "contains no requirement that a contract be signed in order for its arbitration clause to be enforceable." Pet. at 18. Petitioners' interpretation of the FAA fails because it improperly places the FAA in direct conflict with the clear requirements of the Convention.

By its own explicit terms, the FAA only applies "to the extent [the FAA] is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Thus, the FAA requires that when the FAA and the Convention conflict, the Convention's standards prevail. *See id.*; *see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005) (holding that the FAA was not applicable to a case governed by the Convention, and citing section 208 for the proposition that the FAA and the Convention "provide overlapping coverage to the extent they do not conflict"); *McDermott Int'l, Inc. v.*

Lloyd's Underwriters of London, 120 F.3d 583, 588 (5th Cir. 1997) (holding that the FAA was not applicable to a case governed by the Convention because the two provisions were in conflict, and noting that the FAA is the "approximate domestic equivalent of the Convention . . . except where the FAA conflicts with the Convention Act's few specific provisions."); *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996) (same).

To argue that courts can look to the FAA's writing requirement where an arbitration provision fails under the Convention's standards, Petitioners cite Article VII(1) of the Convention and the corresponding recommendation of the United Nations Commission on International Trade Law ("UNCITRAL"). Article VII(1) of the Convention states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement ***of arbitral awards*** entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself ***of an arbitral award*** in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

(emphasis added). On its face, Article VII applies only to arbitration awards – not agreements – and it preserves the rights of award recipients to enforce the award in the manner prescribed by "the law or the treaties of the country where such award is sought to

be relied upon." Because the Convention preserves those rights vis-à-vis arbitration awards does not change the definition of what constitutes an enforceable arbitration provision under Article II. Indeed, if the Article II drafters wanted the writing requirement of each signatory country to apply, then they would have added language comparable to the provision found in Article VII. They did not, and any discussion of Article VII related to the Convention's writing requirement is inapposite.

Petitioners cite no additional authority supporting their contention that if an arbitration provision does not satisfy the Convention's writing requirement, then courts can look to the FAA's relaxed writing requirement as an alternative basis for enforcing the provision. Instead, Petitioners' arguments undermine the fundamental purpose of the Convention. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to . . . unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 2457 (1974) (internal quotations omitted). If the FAA and the arbitration statutes of individual signatory countries can supplant the Convention's explicit signature requirement, then the Convention's purpose of creating unifying standards for international arbitration agreements will be subverted. Indeed, Petitioners' unsupported argument would render the Convention's signature requirement superfluous and unnecessary. *See Hibbs v. Winn*, 542 U.S. 88, 89, 124 S. Ct. 2276, 2279 (2004) ("the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is render superfluous").

To conclude that the FAA's relaxed signature requirement serves as an alternative to the Convention's explicit signature requirement would render Article II of the Convention meaningless and undermine the purpose of the Convention. Because the arbitration provision in Neilson's employment letter does not satisfy the Convention, and because the FAA's relaxed signature requirement cannot apply to it, the provision is unenforceable, and the Court should deny the Petition.

B. THERE IS NO RELEVANT SPLIT OF AUTHORITIES AMONG THE CIRCUIT COURTS.

For the very first time in their Petition, Petitioners allege the existence of a purported split of authorities regarding how federal circuits interpret and apply the Convention. Petitioners never alleged the existence of a purported circuit split to the Missouri Court of Appeals[4] or even cited to *Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), the Fifth Circuit decision from 1994 Petitioners now claim

4. Petitioners' failure presumably would explain their non-compliance with Sup. Ct. R. 14, which directs petitioners seeking review of a state-court judgment to specify "when the federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." SUP. CT. R. 14(g)(i). Petitioners cannot point the Court to any provisions in the record where they raised *Sphere Drake* or the purported circuit split because they failed to do so. As a result, the Missouri Court of Appeals did not render a decision on this point for the Court to review.

is the basis for this circuit split, in any of their briefing. Because Petitioners never raised the issue or directed the Missouri Court of Appeals to *Sphere Drake*, the Missouri Court did not render a decision on that point or make any findings regarding the circuit split now identified by Petitioners. The opinion from the Missouri Court of Appeals is therefore silent on this issue.

Petitioners previously failed to cite to *Sphere Drake*[5] because this fourteen-year-old opinion has been soundly rejected by the only two other circuit courts that have addressed this narrow issue. After extensive analysis, the Courts of Appeals for both the Second and Third Circuits rejected *Sphere Drake*'s conclusion, holding that the Convention's signature requirement applies to both arbitral clauses in a contract and in arbitration agreements. *See Standard Bent*, 333 F.3d at 449 ("We agree with the Court of Appeals for the Second Circuit. . . . Thus, the plain language provides that an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters."); *Kahn Lucas*, 186 F.3d at 217-18 ("Indeed, this comma can serve no other grammatical purpose. As a result, [*Sphere Drake*]'s reading of the statute would render the comma mere surplusage, a construction frowned upon. . . . Upon review of the Convention's text, punctuation and subject

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5. In *Sphere Drake*, the court concluded with limited analysis that the phrase "signed by the parties or contained in an exchange of letters or telegrams" modified the precedent "arbitration agreement" but not "arbitral clause in a contract." 16 F.3d at 669-70. Thus, according to *Sphere Drake*, an arbitration provision in an otherwise enforceable contract that is not signed is still enforceable, and only a stand-alone arbitration agreement must satisfy the signature requirement. *Id.*

matter, as well as an examination of the Convention's legislative history, we hold that the modifying phrase 'signed by the parties or contained in an exchange of letters or telegrams' applies to both 'an arbitral clause in a contract' and 'an arbitration agreement.'" (internal citations omitted)).

Not only did Petitioners fail to raise *Sphere Drake* before the Missouri Court of Appeals, but their argument in the underlying appeal was directly contrary to *Sphere Drake* and its holding. Before the Missouri Court of Appeals, Petitioners argued that Neilson's employment letter constituted an "exchange of letters or telegrams" that satisfied the signature requirement of Article II(2) of the Convention. Thus, Petitioners repeatedly sought to invoke the signature requirement of the Convention as a basis for enforcing the arbitration provision. Having lost that argument in the lower courts, they would now disavow the signature requirement and argue that it is inapplicable under the holding of *Sphere Drake*.

This Court has previously stated:

> With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that ***we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. . . .***
>
> The rule serves an important interest of comity. As we have explained, ***it would be unseemly in our dual system of government to disturb***

> ***the finality of state judgments on a federal ground that the state court did not have occasion to consider. . . .***
>
> Our traditional standard also reflects practical considerations relating to this Court's capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but ***also assists us in our deliberations by promoting the creation of an adequate factual and legal record.*** . . . And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 520 U.S. 83, 86-91, 117 S. Ct. 1028, 1029-31 (1997) (emphasis added and internal quotations and citations omitted); *see also Howell v. Mississippi*, 543 U.S. 440, 125 S. Ct. 856 (2005) (dismissing a *writ of certiorari* because the petitioner failed to adequately raise his federal claim before the state court).

In this case, Petitioners never presented the split of authority to the Missouri Court of Appeals, nor did they cite or rely on the holding in *Sphere Drake*. Because the issue was not before it, the Missouri Court of Appeals never rendered a decision on that point. As this Court has previously noted, it would be "unseemly" and in violation of the "important interest of comity" to review a state court ruling on a federal issue when the state court did not have an opportunity to fully adjudicate the matter. *Adams*, 520 U.S. at 86-91, 117 S. Ct. at 1029-31. Because Petitioners raise the split of authority for the first time in their Petition, the Court should deny the Petition.

Even if Petitioners properly presented the circuit split to the Missouri Court of Appeals, the split is not an "important federal question" that warrants this Court's review. Of all of the courts of appeals, only three circuits have addressed how courts should interpret the definition of an "agreement in writing" that is contained in Article II(2) of the Convention. The Fifth Circuit decided *Sphere Drake* in 1994, the Second Circuit decided *Kahn Lucas* in 1999, and the Third Circuit decided *Standard Bent* in 2003. Thus, in the last fourteen years, circuit courts have been presented with the question on only three rare occasions, and there is no evidence that the differences among the circuits are of a magnitude or significance so as to justify this Court's intervention.[6] Petitioners' citation to a fourteen-year-old opinion in an attempt to manufacture a split of authorities among the circuits fails to provide any basis for the Court to grant this Petition.

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6. *See* Kenneth S. Geller & David M. Gossett, *Appeals to the Supreme Court, in* BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 179, 201 § 52:14 (2d ed., Robert L. Haig ed., 2005)

> Review is much more likely if the Court considers the question over which the courts are divided to be "important" (such as the constitutionality of a state or federal statute), or important to the administration of justice (such as the scope of a frequently charged federal crime), or a recurring matter that for which a "uniform rule" is necessary. An issue that arises frequently and over which the lower courts are deeply divided is more likely to be reviewed by the Court than an issue that arises infrequently and over which only two courts are divided – particularly if the infrequently arising issue is not of importance to the functioning of the federal government or the judicial system.

II. THE MISSOURI COURT OF APPEALS' APPLICATION OF THE CONVENTION'S EXPLICIT WRITING REQUIREMENT DOES NOT VIOLATE THE INTENT OF THE CONVENTION OR ANY FEDERAL PUBLIC POLICY.

In the Petition's third argument, Petitioners claim that the Missouri Court of Appeals' application of the explicit language of the Convention requiring an arbitration agreement to be in writing somehow violates the "intention of the Convention" and "Federal Policy." This argument is deeply flawed. The Missouri Court of Appeals followed the "intent" of the Convention by applying its explicit writing requirement. It also followed the underlying policy and intent of the FAA by applying the FAA's plain language, which specifically required the Missouri Court of Appeals to apply the Convention's writing requirement when in conflict with the FAA's provisions.

Petitioners naked claim that "Neilson accepted" SOL's employment letter and "Neilson subsequently tendered and SOL accepted performance thereunder [pursuant to the unexecuted letter agreement] without objection" is a complete distortion of the undisputed factual record that raises no public policy concerns. Pet. at 21-22. In fact, shortly after SOL tendered the letter of employment to Neilson, which he wisely never signed, Neilson elected to perform his job duties in the United States—in direct violation of the proffered letter agreement prohibiting Neilson from performing any duties "while physically in the Untied States." Moreover, the undisputed record confirms that by July 2002— more

than two years *before* any alleged wrongful conduct—Neilson was working in Kansas City as a domestic employee of SOTG, a division of Seaboard. Petitioners' attempt to manufacture facts to support a groundless public policy argument falls far short of justifying review by this Court of the Missouri Court of Appeals' proper application of the plain language the FAA and the Convention. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

III. PETITIONERS FAIL TO PRESENT ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' FACTUAL DETERMINATION THAT RESPONDENTS' CLAIMS DO NOT ARISE OUT OF, RELATE TO OR ARE CONNECTED TO ANY ARBITRATION AGREEMENT IN THE ASSET PURCHASE AGREEMENT.

In their final argument, Petitioners assert that the Missouri Court of Appeals' threshold determination that Neilson's arbitration provision was unenforceable under the Convention and that the arbitration agreement in the Asset Purchase Agreement was inapplicable should have been determined by an arbitrator. This issue, decided correctly pursuant to Missouri state law, provides no compelling reason to grant Petitioners' *writ.*

In making its initial determination regarding whether any Petitioner had any agreement to arbitrate, the Missouri Court of Appeals correctly applied Missouri state contract law to determine whether there was any

relevant agreement to arbitrate between the parties. *See* Pet. at 4a; *see also Liberty Mut. Ins. Co. v. Mandaree Public Sch. Dist. # 36*, 503 F.3d 709, 711 (8th Cir. 2007) (courts "apply ordinary state law contract principles to decide whether parties have agreed to arbitrate a particular matter . . ." (quoting *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 242 F.3d 777, 780 (8th Cir. 2001)).

Missouri state law required that *prior* to compelling arbitration, a court must make a threshold determination as to whether an agreement for arbitration was validly made and whether the dispute at hand "falls within the substantive scope of that agreement." *See* Pet. at 4a, 9a-10a; *see also Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) ("Determination whether the parties contractually agreed to arbitration must occur before the parties are forced to submit to arbitration." (citing *Korte Const. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 398 (Mo. Ct. App. 1996)). The Court of Appeals for the Eighth Circuit applies a similar approach to determine whether an agreement for arbitration is enforceable. *See Medcam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005) (in determining whether to compel arbitration, the court must determine "(1) whether the agreement for arbitration was validly made, and (2) whether the arbitration agreement applies to the dispute at hand, i.e., whether the dispute ***falls within the scope*** of the arbitration agreement." (emphasis in original)); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003) ("it is clear that the validity of the arbitration clause and its applicability to the dispute at hand are questions for

the district court to decide"); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994) ("the district court must engage in a limited inquiry to determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the scope of that agreement").[7]

The Missouri Court of Appeals then correctly applied Missouri law:

> Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. Arbitration must be compelled where a tort claim arises directly out of a dispute regarding the terms of the parties' contract. The relationship between the tort claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties. At the very least, ***for a tort claim to be subject to arbitration under a broad arbitration***

7. Other circuit courts similarly require a trial court to initially determine whether an arbitration agreement exists and, if so, whether the dispute falls within the parameters of that agreement. *See Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (noting there is a two-step process for courts to evaluate arbitration clauses with the first step consisting of "determining whether there is a valid agreement to arbitrate between the parties; and . . . whether the dispute in question falls within the scope of that arbitration agreement." (internal quotations omitted)); *Oil Chem. & Atomic Workers Int'l Union (AFL-CIO) v. Conoco, Inc.*, 241 F.3d 1299 (10th Cir. 2001) (remanding to district court so court could determine arbitrability).

> ***clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract. Where a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled.***

Pet. at 9a-10a (emphasis added and internal citations omitted). The Missouri Court then reviewed Respondents' underlying claims and correctly determined that, based on the unique facts of this litigation, none of Respondents' claims reference or relate to the Asset Purchase Agreement in any way. The Court therefore concluded that the arbitration provision in the Asset Purchase Agreement was inapplicable.

> None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims in the Petition, the arbitration clause in the Agreement is not applicable.

Pet. at 11a.

Regarding the arbitration provision in Neilson's employment letter, the Missouri Court determined as a matter of law that the provision was unenforceable on its face because it did not satisfy the requirements of the Convention. Pet. at 5a-8a. The Missouri Court, therefore, never addressed the broader question of whether the underlying causes of action in this specific lawsuit fall within any applicable arbitration agreement. *See* Pet. at 5a.

Despite the Missouri Court of Appeals correctly resolving these factual questions in conformity with Missouri state law, Petitioners now claim that even this minimal threshold determination should have been referred to an arbitrator. In support of their argument, Petitioners cite *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005) and *Terminix Int'l Co. LP v. Palmer Ranch LP*, 432 F.3d 1327 (11th Cir. 2005), which Petitioners claim support their argument that Petitioners' two arbitration provisions manifest a "clear and unmistakable agreement" to refer arbitrability to an arbitrator.[8] The courts in *Contec* and *Terminix* held that where a party incorporates arbitration rules that refer arbitrability to an arbitrator, then that incorporation serves as "clear and unmistakable" evidence of the parties' intention to refer disputes about arbitrability to an arbitrator. Petitioners claim the Missouri Court committed reversible error when they

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8. Petitioners cite *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995) and assert that the Missouri Court's Order conflicts with this case. That case, however, merely sets forth the standard for referring arbitrability to an arbitrator – the Missouri Court did not cite or refute *First Options* in any way.

declined to follow the holdings of *Contec* and *Terminix*.[9] These arguments are incorrect.

As an initial matter, neither *Contec* nor *Terminix* are controlling authority for the Missouri Court of Appeals, and Petitioners cite no authority for the proposition that the Missouri Court was obligated to adopt those decisions as the law of the State of Missouri. In any event, the Missouri Court of Appeals never addressed whether any dispute in this litigation fell within the arbitration clause in Petitioner Neilson's employment letter because the Missouri Court concluded that the arbitration agreement was unenforceable under the Convention. With regard to the Asset Purchase Agreement, the Missouri Court of Appeals similarly decided that on its face, the arbitration agreement contained in that contract was similarly irrelevant to the parties' dispute. These holdings, decided pursuant to the unique facts of this lawsuit and Missouri state law, fail to raise any compelling reasons warranting this Court's review. Petitioners' objections to the Missouri Court of Appeals' factual determinations fail to raise any basis for granting the Petition. *See* SUP. CT. R. 10.

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9. A number of other courts have rejected Petitioners' position. *See Diesselhorst v. Munsey Bldg., L.L.L.P.*, No. Civ. AMD 04-3302, 2005 WL 327532 (D. Md. Feb. 9, 2005) (incorporating AAA Rules does not refer arbitrability to the arbitrator); *Martek Biosciences Corp. Zuccaro*, No. Civ. AMD 04-3349, 2004 WL 2980741 (D. Md. Dec. 23, 2004) (adopting the Judicial Arbitration and Mediation Services ("JAMS") Rules does not refer arbitrability issues to the arbitrator); *In re Tyco Int'l, Ltd.*, No. 02-1335-B, 2004 WL 524429 (D.N.H. March 16, 2004) (incorporating AAA Rules does not refer arbitrability to the arbitrator).

CONCLUSION

A federal district court, a state trial court, and a three-judge panel of the Missouri Court of Appeals have reviewed exhaustive briefing related to Petitioners' arguments and unanimously rejected them in their entirety. Given the opportunity to review those decisions and come to a different conclusion, both the Missouri Court of Appeals for the Western District sitting *en banc* and the Missouri Supreme Court have declined.

The Petition presents no "compelling" or persuasive reason to disturb the decisions of the underlying courts. The Petition does not set forth any split of authority that has been properly preserved for this Court's consideration, nor does it articulate any significant unresolved legal questions that warrant the Court's consideration. At its best, the Petition argues that the Missouri Court of Appeals made an erroneous decision based on the facts of the case, but this is an insufficient basis for granting *certiorari*. Respondents respectfully submit that the Court should deny the Petition in its entirety, and grant any other relief the Court deems just and proper.

Respectfully submitted,

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